Filed 12/13/01

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. FRANK VALENTINO GUTIERREZ, Defendant and Appellant.	B146885 (Los Angeles County Super. Ct. No. VA060117)

APPEAL from the judgment of the Superior Court of Los Angeles County. Patrick T. Meyers, Judge. Affirmed.

Gerald M. Serlin, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven D. Matthews and David F. Glassman, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted appellant, Frank Valentino Gutierrez, of assault with a deadly weapon in violation of Penal Code section 245, subdivision (a)(1)[1] (count 1); mayhem in violation of section 203 (count 2); and attempted voluntary manslaughter in violation of sections 664 and 192, subdivision (a) (count 3). The jury found true the following allegations: personal infliction of great bodily injury in violation of section 12022.7, subdivision (a) (counts 1 and 3) and personal use of a deadly weapon in violation of section 12022, subdivision (b)(1) (counts 2 and 3).

The court sentenced appellant to a total of nine years in state prison, which consisted of the upper term of eight years in count 2 and a one-year consecutive term for the deadly weapon use allegation. The court stayed sentences on the remaining counts pursuant to section 654.

On appeal appellant contends: (1) the trial court committed reversible error by excusing a juror during deliberations without proper inquiry; (2) the court erroneously admitted evidence of appellant's uncharged prior threat to kill the complaining witness; (3) the trial court committed reversible error by instructing the jury with CALJIC No. 2.52, the flight instruction; (4) the trial court committed prejudicial error by failing to instruct the jury sua sponte with an imperfect self-defense instruction with regard to mayhem; and (5) the trial court committed reversible error by instructing the jury with CALJIC No. 17.41.1.

FACTS

In June 2000, Ronnie Jeter lived on Fairford Avenue in Norwalk. Ronnie had lived in the same house, which belonged to his Aunt Rita, nearly all his life. Rita is appellant's mother. The other residents of the home were Ronnie's wife and children, his brother Danny, his Aunt Rita, and his cousin, appellant.

At approximately 10:30 p.m. on June 18, Ronnie and Lisa, his wife, were watching television in the living room. As Ronnie was kissing Lisa, appellant put his

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[1] All further statutory references are to the Penal Code unless otherwise stated.

head through the living room door. Appellant said to them: "'Don't be having sex on my couches.'" Ronnie and Lisa both told appellant to "shut the fuck up" and to mind his own business. Appellant replied: "'What the fuck is that, Ronnie? Why don't you stand up and fight like a man.'" Then appellant charged at Ronnie.

As Ronnie started to stand up, appellant punched him in the face below his left eye and knocked him back onto the couch. When Ronnie got back up and prepared to fight with appellant, appellant ducked his head and shielded himself. Ronnie hit appellant two or three times on the back of the head and on the hand while appellant covered himself. Appellant then turned and ran to the hallway with Ronnie right behind him. Ronnie is five feet seven inches tall and weighs 145 pounds. Appellant is approximately six feet tall and weighs between 270 and 300 pounds.

Appellant ran into his bedroom with Ronnie close behind him. Appellant grabbed a knife from a counter and began stabbing Ronnie. The knife was five or six inches long. Ronnie tried to block the knife thrusts. He was stabbed in his left arm about eight or nine times. Ronnie tried to back up and get away as he tried to protect his stomach. Appellant was swinging the knife all over. Ronnie tripped over a coffee table and fell. Appellant leaned over him and continued stabbing. Appellant swung the knife about 12 to 15 times, and four or five of those swings were made while Ronnie was on his back on the floor. Ronnie used his feet to defend himself and was stabbed on the bottom of his foot. He was stabbed in his hand, and one stab nicked Ronnie's neck. When appellant stabbed Ronnie under the eye, the eye went black, and Ronnie said: "'What the fuck did you do to my eye? What are you doing?'" Appellant replied: "'I'm going to kill you.'" After appellant said he was going to kill Ronnie, he did not stab Ronnie any more. Ronnie got up and ran through the hallway to the back door in the kitchen.

As Ronnie and appellant ran out of the living room, Lisa looked for the cordless telephone so as to call the police. She then telephoned police but could not get through because the line was busy. As she was on the telephone, she heard her husband say in a cracked voice, as if he were going to cry: "What the fuck are you doing, Frankie? What the fuck did you do to my eye?" Lisa ran to appellant's room and saw appellant bending

over Ronnie with a knife and going down towards him with a chopping motion. Lisa put her foot on appellant's shoulder and tried to push him away. Appellant just looked at her. Lisa ran toward her bedroom and, as she did so, she saw appellant run towards the living room and Ronnie run towards the kitchen. Lisa locked herself in the bedroom but opened the door for Ronnie. An audiotape of Lisa's 911 call was played to the jury.

When Ronnie entered his room, he grabbed a double-bladed throwing knife that was usually kept in a safe in his room. Ronnie grabbed the knife in case appellant returned. He acknowledged he had some karate experience.

Lisa testified at appellant's trial that she saw appellant pacing back and forth on the lawn when the sheriffs arrived. Lisa did not see Ronnie with a knife on the night of the stabbing, and Ronnie had no weapons in the living room. Lisa said she took the knife out before Ronnie entered their bedroom. Neither Ronnie nor Lisa left the room before police arrived.

After the trial court read a limiting instruction, Lisa told the jury about a prior argument she had with appellant. Appellant said he was going to kick Ronnie's ass. Lisa warned appellant she would call the police on him. Appellant replied: "'Fine. I'll kill him then.'" On cross-examination, Lisa acknowledged Ronnie was not home at the time appellant said this and that she and her family remained in the house that night and from then on. No police report was filed, although Lisa called the police and later went to the police station with Ronnie.

David Schoonover is a Los Angeles County Deputy Sheriff. He and his partner, Deputy Graveley, responded to the assault call on the night of the stabbing. When they arrived, a male Hispanic, later identified as appellant, approached them and said, "'He's inside.'" Appellant had blood on his shirt, hands, and legs. When appellant identified himself, the officers detained him in their patrol car because they recognized his name as that of the suspect. When the officers entered the home, they encountered Ronnie, who collapsed, and Lisa. Based on Lisa's information, Schoonover arrested appellant for assault with a deadly weapon. Schoonover walked in the direction appellant had been

first seen and found a nine-inch kitchen knife on the apron to a rain gutter. Appellant had no injuries apart from 2 one-half inch lacerations to his right knee.

Schoonover spoke with Ronnie approximately 10 minutes after his arrival. Ronnie did not tell him that appellant said he was going to kill him. Otherwise, Schoonover would have included the threat in the police report.

The evidence at appellant's trial showed photographs demonstrating that Ronnie suffered a stab wound to his eye, an abrasion to his back, and three stab wounds to his left arm. It was two weeks before he regained the sight in his left eye. Ronnie showed a scar beneath his left eye and a quarter-inch scar on his hand. He spent one day in the hospital and needed no stitches.

Appellant did not testify at his trial.

DISCUSSION

I. Dismissal of Juror

At 3:00 p.m. on Friday, October 27, 2000, the jury heard its final instructions and retired to deliberate. One hour later, the proceedings were adjourned until Monday, October 30, 2000, at 9:30 a.m. At 9:00 a.m., before the jurors met, the trial court was handed a letter from Juror No. 1. The court read the letter, dated October 28, 2000, as follows:

"'Judge Meyers,

"'Since we still have one alternate juror, I must ask you to excuse me as a juror on the case of People v[.] Frank Gutierrez if my being so excused will not result in a mistrial and/or necessitate the repetition of the entire process we've been through. I ask . . . to be excused on religious and moral grounds.

"'I did not come to this decision until 4:00 a.m. this morning. I am a religious and moral conservative, and I realize that it would be hypocritical for me to presume to stand in judgment of Frankie Gutierrez. The ideas of ["]Judge, not lest ye be judged,["] and the parable of the adultress [*sic*] who is to be stoned, resulting in the warning of ["]Let him among you who is without sin cast the first stone,["] echoes in my mind. I am not without sin, and for me to stand in judgment of Frankie Gutierrez would be hypocritical.

"'From careful observation of Frank Gutierrez during the trial, as well as listening to both prosecution and defense, I believe Frank Gutierrez to be very emotionally immature and to probably have diminished mental capacity as well. I regret that jurors may not ask questions of the principals in the trial because there are many, underlined, unanswered questions in my mind. These questions concern the relationship and interaction of the excused -- of the accused and victim with one another and also as to the accused's mother as well. I must ask myself what a psychiatric evaluation of Frank Gutierrez would reveal.

"'Frank Gutierrez may not belong in society, but I do not believe he belongs in prison either. I am convinced that a person such as Frankie would not last six months in prison. Prison would be a death sentence for him.

"'Some might criticize my request to be excused as neglect of my civic duty, but after serving the United States in two wars and being a teacher and mentor of our youth for 33 years, I'm prepared to be judged on that record.

"'I appeal to you to excuse me from any further jury service. Respectfully submitted, Juror No. 1[.]"

The court read the letter aloud to both counsel and determined first that the jurors should not begin deliberations until Juror No. 1 had been questioned. With both counsel present, the trial court asked Juror No. 1 why he did not express his reservations during voir dire. The juror replied that he "did not have those reservations until the case and the testimony of both sides had been fully developed." When asked if he had discussed his religious and moral concerns with the other jurors, the juror replied that he had not. The court asked no further questions.

Outside the presence of Juror No. 1, the trial court commented first that the letter, on its face, was evidence that the juror was not following instructions in that he was considering the defendant's punishment. The court then asked the parties to stipulate to excusing the juror for cause. Defense counsel refused and objected to excusing Juror No. 1. Counsel stated only that the juror had said during voir dire that he could be fair and was simply trying to get out of jury service. The People then moved to dismiss the

juror for cause, and the court granted the motion, stating there was ample cause for the dismissal. The court added that the letter showed the juror was considering matters not in evidence as well as considering punishment.

Appellant claims the trial court improperly dismissed Juror No. 1 without making proper inquiry into the juror's ability to perform his duties within the meaning of section 1089. Appellant points to Juror No. 1's statement that he was willing to serve if his dismissal would cause a mistrial. Therefore, appellant maintains, the juror's inability to serve does not appear in the record as a "'"'demonstrable reality.'"'" (*People v. Cleveland* (2001) 25 Cal.4th 466, 474.)

Section 1089 permits a sitting juror to be dismissed and replaced with an alternate if "at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his duty, or if a juror requests a discharge and good cause appears therefor . . . ." (§ 1089.) We review the trial court's decision to discharge a juror and replace him or her with an alternate for abuse of discretion. The trial court's ruling will be upheld if there is any substantial evidence in support of the ruling. (*People v. Williams* (2001) 25 Cal.4th 441, 448; *People v. Cleveland*, *supra*, 25 Cal.4th at p. 474.) However, as appellant has pointed out, a juror's inability to serve as a juror must "'"'appear in the record as a demonstrable reality.'"'" (*People v. Williams*, *supra*, at p. 448.)

We conclude there was substantial evidence to support the court's finding that good cause existed to discharge Juror No. 1. The juror's letter, taken as a whole, clearly indicated he was unable to properly perform his duties as a juror.

As stated in *People v. Williams*, *supra*, 25 Cal.4th 441, "[a] juror who refuses to follow the court's instructions is 'unable to perform his duty' within the meaning of Penal Code section 1089. As soon as a jury is selected, each juror must agree to render a true verdict '"according only to the evidence presented . . . and *to the instructions of the court*."'" (*Id*. at p. 448, original italics.)

Good cause exists to discharge a sitting juror when he or she exhibits bias or a fixed prejudgment of the issues, or an inability or refusal to deliberate, to apply the law as

instructed by the trial court, or to perform various other duties. (See, e.g., *People v. Keenan* (1988) 46 Cal.3d 478, 532 [sitting juror's bias constitutes good cause for discharge]; *People v. Thomas* (1990) 218 Cal.App.3d 1477, 1484-1485 (same); *People v. Feagin* (1995) 34 Cal.App.4th 1427, 1437 [good cause to dismiss when juror prejudged issues].)

In *People v. Collins* (1976) 17 Cal.3d 687 (*Collins*), for example, our Supreme Court found good cause existed to discharge a juror on facts not unlike those in the instant case. In *Collins*, after deliberations had begun, a juror requested that she be excused because she "felt more emotionally than intellectually involved and . . . thought she would not be able to make a decision based on the evidence or the law." (*Id*. at p. 690.) The Supreme Court found the juror's assertions that she had been upset during the trial and could not perform her duty established good cause for her discharge. (*Id*. at p. 696.) Although Juror No. 1 did not expressly say he could not decide based strictly on the evidence and the law, his letter proved he could not. The court in *Collins* conducted a more extensive inquiry, but this was not required in the instant case. The juror in *Collins* was in a highly emotional state, whereas Juror No. 1 was articulate and precise, and he fully stated in his letter his grounds for wishing to be excused. "The court's discretion in deciding whether to discharge a juror encompasses the discretion to decide what specific procedures to employ including whether to conduct a hearing or detailed inquiry." (*People v. Beeler* (1995) 9 Cal.4th 953, 989; see also *People v. Keenan, supra*, 46 Cal.3d at p. 539 [trial court has "broad discretion as to the mode of investigation of allegations of juror misconduct"]; *People v. Dell* (1991) 232 Cal.App.3d 248, 255 [after juror's request for dismissal, good cause determination does not always require a hearing].)

The jury had been given the standard instruction that it "must base [its] decision[s] on the facts and the law," and that it must accept and follow the law as stated by the court regardless of whether it agreed with the law. (CALJIC No. 1.00) The jury was told it was not to be influenced by pity or prejudice, sentiment, conjecture, sympathy, or passion. Juror No. 1 admitted to being influenced by all of these. The jury was told to decide all questions of fact from the evidence in the trial and not from any other source.

It was instructed that it must not consider facts as to which there was no evidence. The jury was told not to discuss, or even consider, the subject of penalty or punishment. Juror No. 1 left no doubt he had considered facts not in evidence and appellant's potential punishment. Even if Juror No. 1 expressed willingness to remain on the jury, his ability to render a verdict based upon the law and the facts was doubtful, as revealed by his own admissions. The California Supreme Court has emphasized "that when a trial court learns during deliberations of a jury-room problem which, if unattended, might later require the granting of a mistrial or new trial motion, the court may and should intervene promptly to nip the problem in the bud." (*People v. Keenan*, *supra*, 46 Cal.3d at p. 532.)

As quoted previously, the trial court adequately explained its reasoning for finding good cause. The court made sufficient inquiry to determine whether Juror No. 1 may have affected the impartiality of the other jurors. In addition, the court properly admonished the reconstituted jury as follows: "Ladies and Gentlemen of the jury: [¶] One of your number has been excused for legal cause and replaced with an alternate juror. You must not consider this fact for any purpose. The People and the defendant have a right to a verdict reached only after full participation of the 12 jurors who return the verdict. This right may be assured only if you begin your deliberations again from the beginning. [¶] You must, therefore, set aside and disregard all past deliberations and begin deliberating anew. This means that each remaining original juror must set aside and disregard the earlier deliberations as if they had not taken place. [¶] You shall now retire to begin your deliberations anew in accordance with all the instructions previously given." (See CALJIC No. 17.51.) The court then gave the jury a new set of jury instructions.

We believe substantial evidence supports the court's determination that good cause existed to dismiss Juror No. 1. There was no violation of appellant's constitutional rights, nor was there a violation of Penal Code section 1089. Juror No. 1's inability and professed unwillingness to properly perform the functions of a juror were a "'"'demonstrable reality.'"'" (*People v. Williams*, *supra*, 25 Cal.4th at p. 448; *People v. Cleveland*, *supra*, 25 Cal.4th at p. 474.)

II. Admission of Appellant's Prior Threat

Over appellant's objection, the trial court allowed the People to question Lisa Jeter in front of the jury regarding appellant's prior threat regarding Ronnie.

At a hearing pursuant to Evidence Code section 403,[2] Lisa Jeter said that approximately three months prior to the stabbing incident, she argued with appellant. The argument occurred in the living room where Lisa, appellant, and his mother, Rita, were present. Ronnie was not at home. Lisa did not remember what the argument was about. She did remember that appellant said he was going to "kick Ronnie's ass." Lisa responded: "'That's fine,'" and said she would just call the police if appellant touched Ronnie. Appellant then said he would kill Ronnie and Danny.

After Lisa testified, defense counsel argued that the evidence was inadmissible under Evidence Code section 352. Counsel pointed out that Lisa's testimony was unsubstantiated and suspect because of her selective recall, and because Ronnie was not there at the time the threat was supposedly made. Counsel stressed that the prosecution would have difficulty proving intent to kill without the alleged statement.

The court maintained its tentative finding that it had sufficient evidence before it that appellant made the statement "or so conducted himself within the meaning of Evidence Code section 403[,] subdivision (a)(4)." As for Evidence Code section 352, the court found the probative value outweighed the prejudicial effect as long as appellant's reference to Danny was excluded.

Prior to Lisa's testimony in front of the jury about the prior threat, the court admonished the jury, stating: "Ladies and gentlemen, I want to instruct you at this point. This is a limiting instruction. [¶] The evidence that you're about to hear, if believed, may not be considered by you to prove that defendant is a person of bad character or that

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[2] Evidence Code section 403 provides in pertinent part that proffered evidence is inadmissible unless the trial court finds there is sufficient evidence showing the existence of the preliminary fact when the proffered evidence is of a statement or other conduct of a person, and the preliminary fact is whether that person made the statement or so conducted himself. (Evid. Code, § 403, subd. (a)(4).)

he has a disposition to commit crimes. It may be considered by you only for the limited purpose of determining if it tends to show the existence of the intent, which is the necessary element of the crime charged."

Appellant argues that there were insufficient similarities between the prior uncharged offense and the charged offenses to establish intent. Also, the prejudicial effect of the evidence outweighed its marginal relevance. According to appellant, the evidence impermissibly allowed the jury to draw the inference that appellant had long held the requisite intent to kill Ronnie, which is an element of both attempted murder and voluntary manslaughter. Appellant also contends the evidence was cumulative of the threat appellant allegedly made during the stabbing.

A trial court's admission of evidence under Evidence Code section 1101 should be reviewed for an abuse of discretion. (*People v. Memro* (1995) 11 Cal.4th 786, 864.) Similarly, the trial court's determination that the probative value of evidence outweighs its prejudicial effect under Evidence Code section 352 is a discretionary power that "must not be disturbed on appeal *except* on a showing that the [trial] court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Jordan* (1986) 42 Cal.3d 308, 316, original italics.)

Evidence Code section 1101, subdivision (a) states: "Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion."

Evidence Code section 1101, subdivision (b) provides an exception to this rule by stating: "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act."

In the instant case, appellant's intent was a disputed material issue. Uncharged acts are admissible "'where the proof of defendant's intent is ambiguous, as when he

admits the acts and denies the necessary intent because of mistake or accident.'" (*People v. Robbins* (1988) 45 Cal.3d 867, 879.) "'"[I]f a person acts similarly in similar situations, he probably harbors the same intent in each instance" . . . , and . . . such prior conduct may be relevant circumstantial evidence of the actor's most recent intent.'" (*People v. Miller* (2000) 81 Cal.App.4th 1427, 1448.) Here, the act of the stabbing was not disputed, but appellant attempted to show through cross-examination and argument that he was afraid of Ronnie and was acting in self-defense. Therefore, evidence that tended to prove appellant's intent was not cumulative and, thus, admissible. The California Supreme Court has held that even a generic threat is admissible as circumstantial evidence under section 1101, subdivision (b) to show pre-existing intent in a homicide case. (See *People v. Lang* (1989) 49 Cal.3d 991, 1013-1016 and cases cited therein.)

In *People v. Ewoldt* (1994) 7 Cal.4th 380, 393-407 (*Ewoldt*), the California Supreme Court interpreted Evidence Code section 1101, subdivision (b) at length. *Ewoldt* reasoned that the least degree of similarity between the uncharged and charged offenses is required to prove intent. (*Ewoldt*, *supra*, at p. 402.) The uncharged misconduct need only be sufficiently similar to support an inference that the defendant probably had the same intent on each occasion. (*Ibid*.) Here, the prior threat was made regarding the same victim (Ronnie) and was made at home during a domestic dispute. The similarities in appellant's belligerent conduct and words on the two occasions toward the same people (Ronnie and Lisa) were sufficient to support the trial court's ruling.

With respect to Evidence Code section 352, the record shows that the trial court properly weighed the probative value of the evidence against its potential for undue prejudice. "The two crucial components of section 352 are 'discretion,' because the trial court's resolution of such matters is entitled to deference, and 'undue prejudice,' because the ultimate object of the section 352 weighing process is a fair trial." (*People v. Harris* (1998) 60 Cal.App.4th 727, 736.) As stated in *People v. Miller*, *supra*, 81 Cal.App.4th 1427, "'"The 'prejudice' referred to in Evidence Code section 352 applies to evidence

which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues."'" (*Id.* at p. 1449.)

Here, the evidence was relevant and probative on the issues of appellant's intent. Therefore the probative value of the evidence was high. The prior threat was unlikely to evoke an emotional bias in the jury, since the threat was not accompanied by any action in the prior instance. We conclude the trial court properly could have concluded that any possible prejudice was outweighed by the probative value of the evidence. Moreover, the jury was properly admonished with a limiting instruction before it heard the evidence and again prior to deliberations. (CALJIC No. 2.50.) There was no error or abuse of discretion.

In any event, the judgment may be overturned only if, "'after an examination of the entire cause, including the evidence,' [the court] is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836.) In this case, the evidence of appellant's intent to kill was strong. He took up a knife against an unarmed man and repeatedly stabbed him even after the victim had fallen. He stabbed Ronnie in the eye and "nicked" Ronnie's neck. If it were not for Ronnie's defensive action, the results could have been fatal. Therefore, it is not reasonably probable appellant would have achieved a more favorable result absent the evidence of the prior threat.

III. CALJIC No. 2.52, the Flight Instruction

Appellant argues that reading the flight instruction was reversible error because no facts warranted the instruction. Appellant contends that he left the house after stabbing Ronnie and waited for police. In addition, he approached law enforcement officers upon their arrival and identified himself. Appellant asserts it is reasonably probable he would have obtained a more favorable result absent the error. This is because the prosecutor inaccurately emphasized to the jury that appellant's flight established his intent to kill Ronnie.

"'In general, a flight instruction "is proper where the evidence shows that the defendant departed the crime scene under circumstances suggesting that his movement was motivated by a consciousness of guilt." [Citations.] "'[F]light requires neither the physical act of running nor the reaching of a far-away haven. [Citation.] Flight manifestly does require, however, a purpose to avoid being observed or arrested.'" [Citations.] "*Mere* return to familiar environs from the scene of an alleged crime does not warrant an inference of consciousness of guilt [citations], but the *circumstances* of departure from the crime scene may sometimes do so." [Citation.]' (*People* v. *Bradford* (1997) 14 Cal.4th 1005, 1055, original italics.)" (*People v. Smithey* (1999) 20 Cal.4th 936, 982.)

The evidence showed that appellant ran out of the house immediately after Ronnie managed to escape from appellant's room. When police arrived, appellant was seen returning to the house. After arresting appellant, Deputy Schoonover went in search of the knife and found it in a gutter located approximately 100 feet from the house.

Appellant's flight from the house clearly allowed the jury to infer that appellant wished to avoid being "observed," and probably wished to avoid being arrested. Appellant apparently changed his mind about running after he had disposed of the weapon, but this does not negate the fact of his initial flight. Clearly, the circumstances of appellant's departure from the scene of the stabbing warranted the inference of consciousness of guilt. (*People v. Smithey, supra*, 20 Cal.4th at p. 982.) Moreover, the flight instruction allows the jury to determine if the fact of a defendant's flight was proved before determining whether to consider that fact and how much weight it should carry in deciding guilt.

Even if the instruction were erroneous, it would be harmless error, since the evidence of appellant's guilt was overwhelming, as noted in the preceding section. Appellant's claim that he was prejudiced because the prosecution improperly argued regarding his flight is unfounded. Appellant quotes the prosecutor's argument incompletely, and thus, inaccurately. The prosecutor stated: "Now, Frank Gutierrez runs from the scene. He didn't stay there. He doesn't stay in his room. He doesn't stay in the

house. He runs out of the house. What does he do? What's the first thing he does? Dumps the knife. [¶] Okay. Why is that significant? Why do people do things? They do things for a reason. Why did he dump the knife? That act shows a consciousness of guilt." The prosecutor did not dwell on the act of flight and could properly argue that the act of throwing away the weapon showed a consciousness of guilt.

IV. Trial Court's Failure to Instruct Sua Sponte on Imperfect Self-defense on Count 3

Appellant argues that the trial court had a duty to instruct sua sponte that an honest but unreasonable belief in the need for self-defense negates the malice required for mayhem in a case such as his where there is more than minimal evidence of self-defense. Appellant maintains that a defendant has a due process right under the Sixth and Fourteenth Amendments to the United States Constitution to have the jury consider his defense.

Section 203 states: "Every person who unlawfully and maliciously deprives a human being of a member of his body, or disables, disfigures, or renders it useless, or cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip, is guilty of mayhem."

Appellant relies on *People v. McKelvy* (1987) 194 Cal.App.3d 694 for the proposition that an instruction on imperfect self-defense must be given in a mayhem case under certain circumstances. These included whether there is sufficient evidence to support a defendant's contention that he or she acted without malice under an unreasonable belief in the need for self-defense and whether there is evidence to support conviction of a lesser included offense to mayhem (and the jury is so instructed). (*Id.* at p. 704.) We note initially that appellant's case does not fit within the circumstances described by *McKelvy*, since no instructions on lesser included offenses to mayhem were given in his case.

Imperfect self-defense is not a defense. Under section 26, however, a mistake of fact may negate criminal intent. (*People v. Scott* (1983) 146 Cal.App.3d 823, 831.) Imperfect self-defense is a variation on the defense of mistake of fact. It amounts to an

honest but unreasonable belief in the need to defend oneself. Courts have sometimes applied the concept of imperfect self-defense to negate malice aforethought in cases involving homicide, thus reducing the offense to manslaughter. (*People v. Flannel* (1979) 25 Cal.3d 668, 682 (*Flannel*).) The California Supreme Court has ruled that, depending on the facts, a trial court may have a sua sponte duty to instruct on the imperfect self-defense doctrine (a *Flannel* defense) in a homicide case. (*Id.* at pp. 682-683.) In *People v. Minifie* (1996) 13 Cal.4th 1055, 1069, however, the Supreme Court stated, without analysis, that the doctrine of imperfect self-defense does not apply to the crime of assault, a general intent crime.

Mayhem is also a general intent crime. (*McKelvy*, *supra*, 194 Cal.App.3d at p. 702.) In a general intent crime, "the nature of the defendant's *present willful conduct* alone suffices to establish the necessary mental state without inquiry as to an intent to cause further consequences." (*People v. Colantuono* (1994) 7 Cal.4th 206, 217, original italics, fn. omitted.) The initial question, therefore, is whether the application of the doctrine of imperfect self-defense to a general intent crime is a general principle of law. We conclude that it is not.

In *McKelvy*, only the lead opinion of Presiding Justice Kline applied the doctrine of imperfect self-defense to mayhem. (194 Cal.App.3d at pp. 698, 704.) The other two justices on the panel concurred only in the result. (*Id.* at pp. 707-708.) The *McKelvy* opinion states that in mayhem, unlike murder, "[n]o specific intent to maim or disfigure is required, the necessary intent being inferable from the types of injuries resulting from certain intentional acts; one who unlawfully strikes another without the specific intent to commit the crime of mayhem is still guilty of that crime if the blow results in the loss or disfigurement of a member of the body or putting out of the eye of the victim. [Citations.] Nevertheless, the inclusion of the word 'maliciously' in the definition of mayhem clearly requires proof of something more than that the act was done intentionally, willfully or knowingly. [Citation.] According to Perkins's widely accepted definition, 'malice in the legal sense imports (1) the absence of all elements of justification, excuse or recognized mitigation, and (2) the presence of either (a) an actual

intent to cause the particular harm which is produced or harm of the same general nature, or (b) the wanton and wilful doing of an act with awareness of a plain and strong likelihood that such harm may result.'" (*Id*. at p. 702.) The lead opinion in *McKelvy* concluded that a *Flannel*-type instruction would have been appropriate, although it found no error. (*Id*. at pp. 706-707.)

Justice Smith wrote in the concurring opinion that the *Flannel* defense was inconsistent with McKelvy's trial testimony that the blow was accidental, and there was no need to reach the issue of whether an unreasonable belief in the need for self-defense negated the element of malice in mayhem. (*McKelvy*, 194 Cal.App.3d at pp. 707-708.)

The lead opinion in *McKelvy* has been expressly disapproved by Division Five of this District. (*People v. Sekona* (1994) 27 Cal.App.4th 443, 450-451 (*Sekona*).) In *Sekona*, the defendant, charged with mayhem, claimed that under *McKelvy* he was entitled to a sua sponte instruction on the *Flannel* defense. (*Sekona*, *supra*, at p. 448.) The *Sekona* court examined the concepts of malice in both mayhem and murder and concluded the "malice" in mayhem and the "malice aforethought" in murder are different concepts, and mayhem requires no specific intent. (*Id*. at pp. 452-453.) (Cf. § 7, defining "malice," with § 188, defining "malice aforethought.") *Sekona* also noted there was no history in common law or California law of the availability of the *Flannel* defense for mayhem. (*Sekona*, *supra*, at pp. 453-457.) For these reasons *Sekona* rejected defendant's claim. (*Id*. at p. 457.)

Because a holding by one appellate court does not make that holding a general principle of law (*People v. Bacigalupo* (1991) 1 Cal.4th 103, 126), the *McKelvy* opinion does not have the force of law. We agree with *Sekona* and conclude that imperfect self-defense is not a "general principle of law" to be applied to a crime of general intent. This conclusion is reinforced by the recent decision in *People v. Atkins* (2001) 25 Cal.4th 76 in which the California Supreme Court held that voluntary intoxication was not admissible to negate the willful and malicious aspect of the behavior that comprises the crime of arson (§ 451, subd. (c)) because it is a general intent crime. (*People v. Atkins*, *supra*, at

pp. 81, 85-87.) Since mayhem is a general intent crime, no imperfect self-defense instruction was required in this case.

IV. Reading of CALJIC No. 17.41.1

Appellant argues that CALJIC No. 17.41.1 infringes upon a defendant's and the jury's constitutional right to nullify, misinforms the jury as to its power and as to the trial court's power to inquire into deliberation and to punish jurors for their deliberations, improperly chills jury deliberations, and undermines the independence of the jurors by encouraging the majority jurors to impose their will upon a "holdout" juror or jurors. The instruction violates a defendant's right to jury unanimity and a fair trial.

The propriety of CALJIC No. 17.41.1 is presently pending before the California Supreme Court. (See, e.g., *People v. Engelman* (2000) 77 Cal.App.4th 1297, review granted Apr. 26, 2000, S086462.) It is axiomatic, however, that the jury has no right to disregard the law. Therefore, it is not improper to instruct the jury that it must follow the law. (See *People v. Cline* (1998) 60 Cal.App.4th 1327, 1335.) The California Supreme Court has recently reiterated that "'[c]hampioning a jury's refusal to apply the law as instructed is inconsistent with the very notion of the rule of law.'" (*People v. Williams, supra,* 25 Cal.4th at p. 462.) And, "[j]ury nullification is contrary to our ideal of equal justice for all and permits both the prosecution's case and the defendant's fate to depend upon the whims of a particular jury, rather than upon the equal application of settled rules of law." (*Id*. at p. 463.)

Even if the giving of CALJIC No. 17.41.1 were erroneous, it would not rise to the level of structural error, and automatic reversal is not required. The instruction does not affect "'the framework within which [a] trial proceeds'" or render the trial unreliable and unfair. (*People v. Flood* (1998) 18 Cal.4th 470, 493.) Unless a juror commits the misconduct specifically referred to, the instruction is unlikely to have an impact on the trial. The burden is on appellant to show not only error but also prejudice resulting from the error, and appellant has not done so. (*People v. Watson, supra,* 46 Cal.2d 818, 834-836.) In the instant case, there was no jury deadlock, no indication of holdout jurors, and no judicial inquiry into the specifics of the deliberative process. Therefore, employing

the harmless error standard most favorable to appellant (*Chapman v. California* (1967) 386 U.S. 18, 24), we conclude appellant suffered no prejudice, and his argument is without merit. (See *People v. Molina* (2000) 82 Cal.App.4th 1329, 1332.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

_____, J.
COOPER*

We concur:

_____, P.J.
BOREN

_____, J.
NOTT

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* Presiding Justice of the Court of Appeal, Second Appellate District, Division Eight, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.